

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 )  
Friends of Marilyn F. O'Grady )  
and Thomas Keller, in his official capacity )  
as treasurer )  
John F. O'Grady )  
Marilyn F. O'Grady )  
Unknown Respondents )

MURs 5334, 5341 and 5324 AUG -31 A 9:03

**SENSITIVE**

GENERAL COUNSEL'S REPORT #2<sup>1</sup>

I. ACTIONS RECOMMENDED

; take no further action as to Unknown  
Respondents; and find no reason to believe Marilyn F. O'Grady violated the Federal Election  
Campaign Act of 1971, as amended ("the Act") or the Commission's regulations, and close the  
file as to her.

II. BACKGROUND

On August 27, 2004, the Commission found reason to believe that Friends of Marilyn F.  
O'Grady and Thomas Keller, in his official capacity as treasurer (the "Committee"), violated  
2 U.S.C. §§ 433(a), 434(a)(2)(A)(i) and (iii), 434(a)(6)(A), 434(a)(11), 434(b), 441a(f), 441b,  
and 441d(a)(1), and 11 C.F.R. §§ 103.4(b)(4), 104.3(d), 104.11(a), 104.18(a)(1) and (2), largely  
in connection with numerous reporting violations and failures to file reports timely. It also found

<sup>1</sup> All of the facts recounted in this matter occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all citations to the Act are prior to the effective date of BCRA and all citations to the Commission's regulations are to the 2002 edition of Title 11, Code of Federal Regulations, published prior to the Commission's promulgation of any regulations under BCRA.

reason to believe that John O'Grady, the candidate's husband, violated 2 U.S.C. § 441a(a)(1)(A) by making excessive contributions to the campaign.<sup>2</sup>

The Commission

found reason to believe that Unknown Respondents violated 2 U.S.C. §§ 434(c), 441a(a)(1) and (3), 441b(a) and 441d and that the Committee violated 2 U.S.C. §§ 441a(f) and 441b(a) in connection with the leaflet. The Commission made no findings as to Marilyn O'Grady, pending the outcome of an investigation of the leaflet.

Our investigation did not determine the identity of the Unknown Respondents, nor did it uncover any connection between the Unknown Respondents and the Committee. Therefore, as discussed in more detail below, this Office recommends that the Commission take no further action and close the file with respect to the Unknown Respondents and find no reason to believe that Marilyn O'Grady violated the Act and close the file as to her.

<sup>2</sup> A copy of a joint response to the reason-to-believe notification from Marilyn O'Grady and Thomas Keller is included as Attachment 1. A copy of John O'Grady's response is included as Attachment 2.

### III. DISCUSSION

#### A. Investigation of Anonymous Leaflet

At the reason-to-believe stage, there were two specific factors indicating that the Committee may have coordinated with, or had knowledge of, the person or persons(s) who produced an anonymous leaflet expressly advocating the election of Marilyn O'Grady. First, although the Committee had denied in its response that it had authorized, paid for, or coordinated the production of the leaflet, it had not explicitly denied knowing who may have been involved. First General Counsel's Report at 30. During the investigation, however, representatives of the Committee explicitly denied having such knowledge. Second, the leaflet used certain photographs that were apparently from the same photographic event or series as photographs found on the Committee's website, but were cropped differently and were apparently unavailable in the public domain. *Id.* at 28-29. Subsequently, our investigation showed that the Committee received photographs from many sources and did not have exclusive custody or control of the photographs.

In response to the Commission's reason-to-believe findings, both the candidate and the Committee's treasurer, Thomas Keller, submitted comprehensive sworn affidavits. The affidavits each aver that the affiant never "authorized, suggested, reviewed, approved or had any knowledge whatsoever in the planning, funding, publication or distribution" of the leaflet, had any "personal knowledge of the identity of any individual, group of individuals or organization that planned, funded, published or distributed" the leaflet, "never authorized, suggested, directed, or condoned any participation or involvement" by the campaign with the leaflet. The affiants each further declare that, to their knowledge, neither they nor any member or agent of the

1 campaign "had any involvement whatsoever in the planning, funding, publication, or  
2 distribution" of the leaflet. Attachment 1 at 5, 6.

3 With respect to the photographs, our investigation determined that although two  
4 individuals were primarily responsible for the photographs posted on the Committee's website,  
5 the Committee had no "official photographer," and a number of individuals took, and passed on  
6 to the campaign, photographs of campaign events. Specifically, we interviewed Joseph Puk, an  
7 individual who took some of the photographs used on the Committee's website, who stated that  
8 he gave his photographs to campaign staff but no one else and Joseph McGrath, who set up the  
9 Committee's website and posted some photographs that he received from campaign staff, which  
10 he stated he did not share with anyone else.

11 It appears, however, that many other individuals took photographs used by the campaign.  
12 An O'Grady volunteer named Brother Joseph McGrory stated that he received a number of  
13 photographs from various O'Grady supporters not necessarily connected with the campaign who  
14 would take photographs at campaign events. Although Brother McGrory said that he did not  
15 share campaign photographs with anyone else and destroyed them after the campaign, he said  
16 that they were kept in the campaign office to which a number of individuals had access. Thus,  
17 among the possibilities are that some of the individuals who took photographs at campaign  
18 events shared their photographs with both the Committee and the Unknown Respondents, or that  
19 photographs maintained in the campaign office were accessed by individuals whom it would be  
20 difficult, if not impossible, to trace.<sup>3</sup>

21 Because complainant Friends of Carolyn McCarthy had alleged that the Committee had  
22 distributed the leaflet, we also sought to obtain additional information from that source. We

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<sup>3</sup> We also emailed the leaflet to Puk, McGrath and McGrory, none of whom recognized it.

1 spoke to Margaret May, who had been the treasurer for complainant, and to Mary Ellen  
2 Mendelsohn, who had filed the complaint on behalf of complainant. At one point, May had  
3 stated that, according to Mendelsohn, a McCarthy campaign volunteer had called the O'Grady  
4 campaign in 2002 about the leaflet, and spoken to an individual who claimed that the leaflet was  
5 O'Grady literature. However, neither May nor Mendelsohn remembered any additional details,  
6 such as the name of the McCarthy volunteer who purportedly called the O'Grady campaign, or  
7 even whether the individual was male or female, and who they purportedly spoke to at the  
8 O'Grady campaign. We asked Brother McGrory if he could shed light on which individual at  
9 the O'Grady campaign might have been the person who made the purported assertion. He  
10 responded that many of the O'Grady volunteers were elderly individuals and he had no idea what  
11 they might say.

12 May and Mendelsohn also told the staff that the leaflet might have been mailed, despite  
13 the fact that the leaflet itself states that it was distributed by volunteers. Therefore, we also  
14 contacted a mailing house and an organization that FEC disclosure reports showed had received  
15 a disbursement for mailing labels from the Committee. However, neither was familiar with the  
16 leaflet or could shed light on the provenance of the photographs, or the identities of the  
17 Unknown Respondents. In addition, we spoke to four printers who had received disbursements  
18 from the Committee to see if they had the capacity to produce a leaflet similar to the leaflet at  
19 issue. All of them stated that they did not, nor could they provide leads as to who might have  
20 had such a capacity.

21 In the First General Counsel's Report, this Office told the Commission it would pursue  
22 certain leads, and after making an initial assessment of them, make a decision as to whether to  
23 pursue further discovery or recommend no further action as to the leaflet fact pattern. At this  
24 time, there is insufficient evidence to link the Committee with the anonymous leaflet, and this

1 Office does not believe that attempting to pursue further the identity of Unknown Respondents  
2 would be a constructive use of Commission resources. In light of these factors, and the likely *de*  
3 *minimis* impact the leaflet had on the ultimate outcome of the election, we recommend that the  
4 Commission take no further action and close the file as to Unknown Respondents and find no  
5 reason to believe that Marilyn F. O'Grady violated the Act or its underlying regulations, and  
6 close the file as to her.

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15 IV. RECOMMENDATIONS

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21 3. Take no further action and close the file as to the Unknown Respondents.

22 4. Find no reason to believe that Marilyn F. O'Grady violated the Federal Election  
23 Campaign Act of 1971, as amended, and underlying regulations, and close the file as to  
24 her.

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5. Approve the appropriate letters.

Lawrence H. Norton  
General Counsel

Date

8/2/05

BY:

Lawrence L. Calvert Jr.  
Deputy Associate General Counsel  
for Enforcement

Susan L. Lebeaux  
Assistant General Counsel

Ruth Heilizer  
Attorney

Attachments:

- 1.
- 2.
- 3.
- 4.